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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 656

HARRY HIRSCHKOWITZ AND ROY SIMS,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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THE STATE OF OHIO,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

The State Court has not decided a federal question of substance not theretofore determined by this Court, nor has the State court decided any question in a way not in accord with applicable decisions of this Court. No real or substantial federal question is involved herein.

QUESTION PRESENTED.

Petitioners claim that they were denied due process of law and the equal protection of the law in violation of the Constitution of the United States and the State of Ohio in that they were held to answer and compelled to go to trial on the charge of an infamous crime without a valid and sufficient indictment of the Grand Jury.

STATEMENT OF THE CASE.

The evidence established that, during the period July 24 to September 13, 1957, the petitioner Hirschkowitz participated in six acts of fleecing victims out of more than $6,800.00. The petitioner Sims took part in three of the same swindles, involving more than $1,300.00.

In each case the *modus operandi* was basically the same. An ally of the petitioners would select a victim from persons emerging from a bank, pose as an illiterate out-of-towner, exhibit a bundle of money, announce that he was in the city for a gay time, and request assistance in locating a non-existent Jackson Hotel, where a loose woman supposedly resided. Hirschkowitz would then appear, give no indication of knowing his accomplice, join in the conversation, and offer to drive the "stranger" to a place that offered the same attraction as the Jackson Hotel. At this point, the so-called out-out-towner would exhort the victim to accompany him on the journey, and offer to pay both Hirschkowitz and the victim for their time and inconvenience.

When the destination had been reached—an alley or parking lot behind apartments or dwellings—Hirschkowitz would enter a building, emerge a few minutes later with a deck of cards, and announce to his accomplice and to the victim that the "girls" were currently busy. One of the petitioners or their ally (the stranger) would suggest playing three-card monte in the car to while away the interim. The victim would be swept into the game, become confused by the fast talk and other circumstances, and involuntarily participate out of fear based upon his being outnumbered. The confidence men would bet the victim's money without his permission and either lose it or fail to pay him when he won.

Finally, the swindlers would promise to repay the victim's "losses" or to pay his "wins" if he withdrew from bank and exhibited to them a huge sum of money. He would then be driven to the bank and withdraw the funds. That sum too would either be forcefully taken from his or be "lost" to the defendants when they summarily started a new game and bet it for him without his consent. In each case the victim would be nothing more than a confused and cowed spectator at the scene of his own fleecing.

The evidence showed that the victim's consent to part with his money was induced by the petitioners' false and misleading words and actions and eloquent silences. Part and parcel of the fleecing operation were the contrived atmosphere of physical fear and emotional conflict.

Indictments were predicated upon the last two of the six acts of larceny by trick. By virtue of Ohio's "similar act" statute (Ohio Revised Code, Sec. 2945.59), evidence of the preceding four swindles was admitted.

CHRONOLOGY.

On October 15, 1957, the petitioners, together with a companion, pleaded not guilty to the two-count indictment charging them with having unlawfully obtained possession of (1) $1,000.00 from Sam W. Levine and (2) $300.00 from James L. Altmeyer with the consent of the victims, which consent had been induced by false and fraudulent representations and pretenses. (Ohio Revised Code, Sec. 2907.21.)

Four months later, and one week before the commencement of trial, namely, on February 13, 1958, they requested a bill of particulars.

On February 19, 1958, the prosecuting attorney voluntarily and without being ordered by court to do so, pre-

sented a bill containing the following particulars: The petitioners and their companion had acted in concert and by the use and means of an artifice and scheme, commonly known as three-card Monte, and, through such artifice and scheme and false representations made pursuant thereto, had obtained the monies specified in the indictment.

At the commencement of the trial on February 20, 1958, the prosecutor (in response to a question of the trial judge) started that the "false representations" had been made not only pursuant to the conduct of the game of three-card Monte, but also antecedent to the game, the manner of leading the prosecuting witness into the game.

Thereupon the petitioners moved "that the indictment, together with the Bill of Particulars, be quashed as insufficient, with the understanding that *if the Court desires that it be made sufficient, that perhaps can be done.*" (Emphasis supplied.)

The motion to quash was overruled.

The case proceeded. Petitioner Hirschkowitz called as defense witnesses two police officers whose testimony concerned only the dispatch of vehicles to the scene of the arrest and the "booking" of the petitioners at the police station. Neither petitioner Sims nor the companion presented any evidence whatsoever in their own behalf. The petitioners did not testify.

LAW AND ARGUMENT.

Indictment.

The indictment fulfilled all constitutional provisions and the requirements of the applicable statutes governing form, validity, and sufficiency. (U. S. Const., Amend. XIV; Ohio Const. Art. I, Sec. 10; Ohio Revised Code, Secs. 2941.03, 2941.04, 2941.05, 2941.06, 2941.07, 2941.08, 2941.10, 2941.28.)

The charge was "in the words of the section of the Revised Code describing the offense or declaring the matter charged to be a public offense." (Ohio Revised Code, Sec. 2941.05.)

At no time prior or subsequent to the commencement of the trial was the *validity* of the indictment questioned. Petitioners can hardly be heard to complain, especially in view of Ohio Revised Code, Section 2941.29, providing that objections to an indictment are to be seasonably made.

The motion to quash the indictment, orally presented at the beginning of the trial February 20, 1958, was properly overruled because, among other reasons, the petitioners had pleaded the general issue of not guilty on October 15, 1957, thus waiving defects which might be excepted to by a motion to quash. (Ohio Revised Code, Sec. 2941.59; *State v. Foston,* 70 Ohio Law Abs. 540 (Miami County Court of Appeals, 1954) 129 N. E. 2d 307.

At page 8 of their petition, opposing counsel impliedly admit the validity of the indictment when they state that, prior to trial, a bill of particulars was requested and was furnished, "*which under the law of Ohio cannot be considered as in any way aiding the sufficiency of the indictment or correcting any deficiency in the indictment.*"

If the indictment had been invalid, a subsequent bill of particulars would not cure the invalidity.

The matter of the sufficiency of an indictment is exhaustively discussed in *Wharton's Criminal Law and Procedure*, 1957, Vol. IV, pp. 548 to 562, secs. 1758 to 1764.

"* * * it is the policy of modern courts to disregard mere technical objections and to require only that an indictment shall fully state the essential elements of the offense charged * * *.

"The power of the legislatures, acting within constitutional limitations, to dispense with artificialities, technicalities, or of forms in criminal pleadings and to substitute short, simplified forms for the old is settled. Under these simplifying provisions *it is the general rule that an information or indictment is sufficient if the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition or great specification of particulars*, and in such manner as to enable a person of common understanding to know what is intended, and to enable the court to pronounce judgment on a conviction, according to the right of the case, *even though matters of an evidentiary nature are omitted therefrom, especially when they are of such nature as may be supplied by a bill of particulars on application therefor seasonably made* * * *.

"* * * the accused (is entitled) to be advised of the nature of the charge against him, *not to have set forth in the indictment all the specific facts relied on to sustain the charge* * * *.

"Less strictness in pleading the offense is required in those jurisdictions in which an abbreviated or short form of indictment is authorized and the granting of a bill of particulars is made mandatory upon the demand of the defendant * * *.

"While an indictment must set out facts, *it is neither necessary nor proper to allege evidence or dis-*

close in the indictment or information the proof which the prosecution relies upon to establish the charge, or to allege the specific act or acts which proximately caused the result upon which the indictment is based Matters of description or inducement need not be stated with the same particularity as the facts constituting the essential elements of the crime itself are required to be stated * * *. (Emphasis supplied.)

In July 1929, the state legislature simplified the pleading of a criminal charge in enacting what are now known as Secs. 2941.03, 2941.05, 2941.06 (formerly Ohio General Code Sections 13437-2, 13437-4, 13437-5). Under the provisions of Ohio Revised Code Sec. 2941.07, the defendants could seasonably request the prosecuting attorney to furnish a bill of particulars setting up specifically the nature of the offense charged.

The *Cruikshank* case, cited by the petitioners, is clearly distinguishable from the case at bar and, accordingly, the principles enunciated in the former should be read in the light of its facts. (*United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588 (1876).) Cruikshank and others had been indicted *under the laws of the United States* upon sixteen counts. The general charge in the first eight counts was that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten and intimidate two citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "*granted and secured to them in common with all other good citizens of the United States by the Constitution and laws of the United States.*" The counts of the indictment were held to be too vague and general:

> A citizen of the United States is also a citizen of a particular state. As a citizen of a particular state,

he possesses rights and privileges *which have neither been granted nor secured to him by the Constitution of the United States.*

The counts did not show that it was the intent of the defendants by their conspiracy to hinder or prevent the enjoyment *of any right granted or secured by the Constitution of the United States.*

There was no specification of any particular right *granted by the Constitution of the United States.*

Mr. Chief Justice Waite eloquently and succinctly stated the issue which was decided: *"According to the view we take of these counts the question is not whether it is enough, in general, to describe a statutory offense in the language of the statute, but whether the offense has here been described at all."*

The *Cruikshank* case, discussed above, comprehends counts of an indictment far different from those in the indictment in this case.

"The State of Ohio:
Cuyahoga County, ss.:

Of the term of September in the year of our Lord one thousand nine hundred and fifty-seven. The jurors of the grand jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present: that Harry Hirschkowitz, Roy Sims and Leo Parker, on or about the 13th day of September, 1957 (20th day of August, 1957), at the county aforesaid, did unlawfully obtain possession of certain money in the amount and value of One Thousand Dollars (Three Hundred Dollars) from Sam W. Levine (James L. Altmeyer), the property of Sam W. Levine (James L. Altmeyer), and did obtain said property from the said Sam W. Levine (James L. Altmeyer), with the consent of the said Sam W. Levine (James L. Altmeyer), which con-

sent the said Harry Hirschkowitz, Roy Sims and Leo Parker induced by false and fraudulent representations and pretenses, with the intent of permanently depriving said Sam W. Levine (James L. Altmeyer) of said One Thousand Dollars (Three Hundred Dollars), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Signed: John T. Corrigan, Prosecuting Attorney."

It will be noted that, in the foregoing recitation of the counts of the indictment, such counts are blended together for the purposes of this pleading to avoid unnecessary repetition.

Similar to the above-cited *Cruikshank* case is another matter cited by the petitioners; namely, *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, 8 S. Ct. 571 (1888). Therein the defendant was indicted for an alleged offense, described in general terms as that of devising "a scheme to defraud divers other persons," to the grand jurors unknown, and intending to effect it by inciting them to open communication with him through the postoffice establishment. The *Hess* case dealt only with generalities. The counts in the indictment in the case at bar charged (1) the unlawful obtaining possession of specific amounts of money, (2) which money was the property of specific persons, (3) with the consent of those specific persons, (4) which consent was induced by false and fraudulent representation and pretenses, and (5) with the intent of permanently depriving those specific persons of those specific amounts.

The petitioners refer to *State v. Knight*, 54 O. S. 365, 43 N. E. 995 (1896) in support of their position—a case wherein there was a defect in *failing to allege that the offense was committed at the county where the indictment*

was found. No situation analogous to the case at bar appears.

The petitioners cite Ohio cases, hoping to sustain their attack upon the indictment in this case. (*Lamberton v. State*, 11 Ohio 284 (1842); *Dillingham v. State*, 5 O. S. 280 (1855); *Redmond v. State*, 35 O. S. 81 (1878), and *DuBrul v. State*, 80 O. S. 52, 87 N. E. 837 (1909).) These cases antedated by many years the above-mentioned simplification by the Ohio legislature in July 1929 of the pleading of criminal charges.

The *Harris* case, cited by the petitioners and decided in 1932, stands for the principle that if *specific* false and fraudulent representations and pretenses are pleaded, there must also appear averments negativing the truth of the alleged false and fraudulent representations and pretenses. In its opinion at page 260, the court quotes from 25 *Corpus Juris* 626, Section 60:

> "The indictment must negative by special averment the truth of *the pretense alleged.*" (Emphasis supplied.) (*Harris v. State*, 125 O. S. 257, 181 N. E. 104) (1932).

In the instant case, no specific false and fraudulent representations and pretenses appeared in the indictment. Hence, there was no necessity for negative averments. The underlying theory is also seen in Ohio Revised Code Sec. 2941.10 (enacted as Ohio General Code Sec. 13437-9 in the year 1929), which dispenses with the indictment's negativing any exception, excuse, or proviso contained in the statute creating or defining the offense charged.

Bill of Particulars.

The petitioners raise the question of the bill of particulars, although they themselves have ruled out that matter at pages seven and eight of their petition:

> "This case is concerned only with the denial of petitioners' constitutional rights by reason of the insufficiency of the *indictment*. * * * Prior to the trial the petitioners had requested the prosecutor to furnish a bill of particulars. A purported bill of particulars was furnished in response to this request, which under the law of Ohio cannot be considered as in any way aiding the sufficiency of the indictment or correcting any deficiency in the indictment."

We have no quarrel with the holdings in *State v. Collett*, 44 Ohio Law Abs. 225, 58 N. E. 2d 417 (1944), and *Campfield v. State*, 91 Ohio Appeals 74, 105 N. E. 2d 661 (1950), relative to the function of a bill of particulars. In fact, the *Collett* case, cited by the petitioners as authority, reveals that the indictment in the case at bar is a valid and sufficient indictment:

> "A bill of particulars is designed to be used *only where the indictment is sufficient on demurrer*."

The *Collett* case quotes approvingly 27 *Am. Jur.* 671, giving further evidence of the sufficiency of the indictment in the instant case:

> "* * * as a general rule where an indictment is substantially good but does not so exactly allege the nature and extent of the crime of which the defendant is accused as will enable him properly to prepare his defense without a bill of particulars, the court will order the prosecuting attorney to furnish such a bill." (Citing *Kirby v. U. S.*, 174 U. S. 47, *Dunlop v. U. S.*, 165 U. S. 486, and other authorities.)

With reference to the right of the petitioners to file a motion to quash an indictment after a bill of particulars

has been furnished, the defense cites *State of Ohio v. Kearns*, 69 Ohio Law Abs. 482, 126 N. E. 2d 607 (1955). *Nowhere in the cited case does it appear that there had been filed a demurrer or plea in bar or the general issue*, any of which would have waived all defects which might be excepted to by a motion to quash. (Ohio Revised Code, Sec. 2941.59.) In the case at bar, as mentioned earlier, the petitioners had pleaded not guilty long before presenting their motion to quash.

Equal Protection of the Law.

Since there was a sufficient indictment in the case at bar, there was no denial to the petitioners of the equal protection of the law guarantee by the provisions of the Fourteenth Amendment to the Constitution of the United States. There was no discrimination in either the form or substance of the formal charge preferred by the grand jury.

There is no parallel between the case at bar and those cited by the petitioners with reference to prison authorities' failure to deliver or suppression of inmates' documents concerning appeals to courts or otherwise dealing with the lawfulness of their imprisonment. (*Cochran v. Kansas*, 316 U. S. 255, 86 L. ed. 1453, 62 S. Ct. 1068; *Dowd v. U. S.*, 340 U. S. 206, 95 L. ed. 215, 71 S. Ct. 262 (1951); *Ortega v. Ragen*, 216 F. 2d 561, 7th Circuit Court of Appeals, 349 U. S. 940, 75 S. Ct. 786 (1954).)

CONCLUSION.

It is apparent that the petitioners had no desire to go to trial on the merits of the case and, accordingly, they utilized last-minute pleadings to forestall a trial by attacking the indictment. It was unnecessary, impracticable, and it would be a disclosure of evidence to include in the indictment the innumerable false and fraudulent representations and pretenses made through speech, silence, action, and inaction.

No substantial Federal Constitutional question is involved in this case, nor is the decision of the courts of the State of Ohio in conflict with any applicable decision of this Court. The claim of the petitioners that they were denied equal protection of the laws and due process of law is without foundation. The Supreme Court of the State of Ohio properly overruled petitioners' motion for leave to appeal.

Respondent respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,
THOMAS L. OSBORNE,
Assistant Prosecuting Attorney,
Attorneys for Respondent.

APPENDIX.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

I.

Constitution of the United States, Amendment XIV, Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II.

Constitution of the State of Ohio, Article I, Section 10. Trial for crimes; Witness.

* * * no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; * * *. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; * * *.

III.

Revised Code of Ohio, Section 2907.21. Larceny by trick.

No person shall obtain possession of, or title to, any thing of value with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing.

Whoever violates this section is guilty of larceny by trick, and, if the value of the thing so obtained is sixty dollars or more, shall be imprisoned not less than one nor more than seven years. If the value is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both.

IV.

Revised Code of Ohio, Section 2941.03. Sufficiency of indictments or informations.

An indictment or information is sufficient if it can be understood therefrom:

(A) That it is entitled in a court having authority to receive it, though the name of the court is not stated;

(B) If it is an indictment, that it was found by a grand jury of the county in which the court was held, of if it is an information, that it was subscribed and presented to the court by the prosecuting attorney of the county in which the court was held;

(C) That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is unknown to the jury or prosecuting attorney, but no name shall be stated in addition to one necessary to identify the accused;

(D) That an offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein;

(E) That the offense was committed at some time prior to the time of finding of the indictment or filing of the information.

V.

Revised Code of Ohio, Section 2941.10. Indictment complete.

No indictment or information for any offense created or defined by statute is objectionable for the reason that it fails to negative any exception, excuse, or proviso contained in the statute creating or defining the offense. The fact that the charge is made is an allegation that no legal excuse for the doing of the act exists in the particular case.

VI.

Revised Code of Ohio, Section 2941.04. Two or more offenses in one indictment.

An indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated.

* * * * *

VII.

Revised Code of Ohio, Section 2941.05. Statement charging an offense.

In an indictment or information charging an offense each count shall contain, and is sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the section of the Re-

vised Code describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged.

VIII.

Revised Code of Ohio, Section 2941.06. Form of indictment or information.

An indictment may be substantially in the following form:

The State of Ohio,
County, ss.:

Of the Term of in the Year of our Lord one thousand nine hundred and

The jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that A. B., on the day of 19 at the county of aforesaid, did (here insert the name of the offense, if it has one, such as murder, arson, or the like, or if a misdemeanor having no general name, insert a brief description of it as given by law) contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

C. D.

Prosecuting Attorney.

(INDORSED) A true bill.

E. F., Foreman of the Grand Jury.

IX.

Revised Code of Ohio, Section 2941.07. Forms in charging offenses.

The following forms may be used in charging offenses:

* * * * *

Larceny. A. B. stole from C. D.
of the value of one hundred dollars.

* * * * *

Forms authorized by other sections of the Revised Code and other brief and comprehensive forms applicable to other offenses may also be used. The prosecuting attorney, if seasonably requested by the defendant, or upon order of the court, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

X.

Revised Code of Ohio, Section 2941.29. Time for objecting to defect in indictment.

No indictment or information shall be quashed, set aside, or dismissed, or motion to quash be sustained, or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment or information, unless the objection to such indictment or information, specifically stating the defect claimed, is made prior to the commencement of the trial, or at such time thereafter as the court permits.

XI.

Revised Code of Ohio, Section 2945.59. Proof of defendant's motive.

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.